United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 76-1194

United States Court of Appeals
FOR THE SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP RASTELLI, et al.,
Defendants,

JOHN JOSEPH SUTTER, Esq.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANT JOHN JOSEPH SUTTER

JAMES R. MOFFATT, Esq.
Attorney for Defendant-Appellant, John Joseph Sutter, Esq.
33 Willis Avenue
Mineola, New York 11501
516—747-5800

JAMES R. MOFFATT
GINO PAPA
Of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

Table of Cases

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

PHILIP RASTELLI, et al.,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

BRIEF ON BEHALF OF APPELLANT JOHN JOSEPH SUTTER

Preliminary Statement

This is an appeal by John Sutter, from an order entered in the United States District Court for the Eastern District of New York on March 30, 1976, by the Honorable Thomas J. Platt, District Court Judge, imposing a fine in the sum of $500.00 per day for a total sum of $1,500.00 the appellant allegedly caused in the commencement of the above captioned trial. The fine was paid.

Statement of Facts

The appellant was the attorney of record for the defendant, Philip Rastelli, in a matter scheduled for trial on March 29, 1976, before the Honorable Thomas J. Platt. The facts as related in Judge Platt's memorandum decision

(appendix pages 145a-152a), are not seriously in dispute except as hereinafter noted.

The appellant, John Joseph Sutter, is an attorney with an active trial practice in both the federal and state courts. On February 28, 1976, Mr. Sutter was retained to try the case of the People of the State of New York against Gregory Charmont in the Nassau County Court before Judge Alfred F. Samenga. Appellant was ordered to trial on short notice due to the fact that the defendant's present counsel suddenly became unavailable on the eve of trial. The trial which commenced on March 8, 1976 included two counts of attempted murder in the first degree of two police officers. Conviction could have subjected Charmont to a sentence of life imprisonment. Appellant was ordered to commence trial and did so in view of the fact that he believed on the bases of two week estimates of both the court and prosecutor that the matter would be concluded well in advance of March 29, 1976 (pages 46a-47a).

The District Court scheduled a pre-trial conference for March 19, 1976. Stephen Willson, Esq., an attorney in Mr. Sutter's office, appeared and in substance applied for an adjournment because Mr. Sutter was still actively engaged in the attempted murder trial before Judge Samenga in Nassau County Court and, consequently, Mr. Rastelli wished to discharge Mr. Sutter and retain the firm of Saxe, Bacon & Bolan, P.C. The court said that substitution of counsel would be permitted only on condition new counsel were prepared to proceed with the trial on the scheduled date of March 29th, some ten days later (page 10a).

On March 24, 1976, Mr. Cohn of the firm of Saxe, Bacon & Bolan, P.C. suggested that because defendant Louis Rastelli had been granted a severance and the trial estimate shortened, that a one-week adjournment might be arranged (concurred in by the government (page 40a))

whereby new counsel could be substituted without disturbing the estimated completion date (page 42a).

On Friday, March 26th, the District Court was served with a petition for writ of mandamus to the Court of Appeals by the firm of Saxe, Bacon & Bolan, P.C. as directed and ordered by Judge Platt (page 44a) seeking a continuance of this matter until April 5, 1976, so that their firm could come in and represent Mr. Rastelli. On Friday, March 26th the appellant had served upon the District Court a detailed affidavit explaining his engagement in the Nassau County Court before Judge Samenga and further on the 29th of March the appellant's associate, Mr. Willson, did appear in court before Judge Platt, but the client, Mr. Rastelli, did not want to go to trial with Mr. Willson (pages 46a-51a; 56a-57a).

The court was advised on the morning of March 29th that the Court of Appeals for the Second Circuit had denied the petition for writ of mandamus stating that it did not have the power to hear the matter, but in view of the circumstances, the Court of Appeals suggested that the District Court reconsider the equities, interests and policies involved and grant the requested continuance.

The District Court then predetermined to impose a $1,000.00 per day fine upon Mr. Sutter without a hearing until he appeared (page 59a).

The court then reconsidered and imposed a contingent fine of $1,000.00 for his failure to appear and Judge Platt stated he would give Mr. Sutter an opportunity to be heard on the subject (page 66a).

On March 30, 1976, after hearing argument on behalf of Mr. Sutter, the court granted the substitution of attorney sought by defendant, Philip Rastelli, and fined Mr. Sutter $1,500.00 for the delay for March 29, 30 and 31, i.e. $500.00 per day, which the court attributed to Mr. Sutter (page 152a).

Statutes Involved

Title 18, United States Code, Section 401, provided that

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions;
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rules Involved

Rule 42 (b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves

> disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 8 of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York provides:

> "(a) Dismissal or Default. Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defaulting party either with respect to a specific issue or on the entire case.
>
> (b) Imposition of Costs on Attorneys. If counsel fails to comply with Rules 3(f), 6(f) or 9 or a judge finds that the sanctions in subdivision (a) are either inadequate of unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business."

Rule 9 of the Criminal Rules of the United States District Court for the Eastern District of New York provides:

> "9. Responsibility of the United States Attorney and Defense Counsel.
>
> (a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as

may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

Questions Presented

1. Whether counsel's failure to attend on the date scheduled in the United States District Court because he was actually on trial in a state cause is sufficient to constitute criminal contempt?

2. Whether the $1,500.00 fine imposed in the form of costs is proper under the circumstances?

POINT I

Counsel's failure to attend on the date scheduled was not a criminal contempt.

According to *United States* v. *Meyer*, 346 F. Supp. 973, 977 (D.C. Cir., 1972)) there are four elements required to support a contempt conviction under 18 United States Code 401(1):

1. misbehavior which
2. occurred in or proximate to presence of the court and which constituted
3. "obstruction of the administration of justice" and which was performed
4. with the required degree of intent.

The necessary quantum of evidence is proof beyond a reasonable doubt. (*United States* v. *Peterson*, 456 F. 2nd 1135 (10th Cir., 1972)).

Upon a fair reading of the appendix below, it is clear that the appellant, John Joseph Sutter, did not commit contempt of court before the United States District Court Judge Thomas J. Platt. Mr. Sutter's conduct was in no way accompanied by any intention to obstruct, disrupt or interfere with the administration of justice; nor does it show a wilfull disregard of an order or disobedience to the court; consequently it does not constitute a criminal contempt (See *United States* v. *Panico*, 308 F. 2d 125 (2nd Cir., 1962); *In re Williams*, 509 F. 2d 949 (2nd Cir., 1975)).

In *Sykes* v. *United States*, 444 F. 2d 928 (D.C. Cir., 1971)) the court reversed the conviction of an attorney who had been held in criminal contempt for failure to appear at the date set for trial. His failure was attributed to lapse of memory, pre-occupation with another case and confusion as to dates. In reversing the court said at page 930 thereof:

> "In the Appellant's case, however, there was no evidence that he deliberately or recklessly disregarded his obligation to the court, or that he intended any disrespect for the Court."

Mr. Sutter's problem arose after he became engaged in a state trial which commenced on March 8, 1976, when he at the time, well knew that he had a trial scheduled in the United States District Court representing the defendant Rastelli in a trial scheduled before Judge Platt on March 29, 1976. The circumstances surrounding this state trial engagement, however, belie any assertion much less any proof that Mr. Sutter acted with any deliberate disregard whatsoever for the trial date set by Judge Platt.

How Mr. Sutter's retention in the state matter came about is very relevant and it is amply stated in Mr. Sutter's affidavit (page 46a). Mr. Sutter was retained by the Charmont family on the eve of trial because defendant Charmont's trial counsel failed to appear in court on the

firm date set for trial weeks before even though the charges involved were most serious, that is, two counts of attempted murder in the first degree and even though defendant's counsel had undertaken to represent the defendant Charmont months before. Mr. Sutter and his partner Mr. Moffatt reviewed the case for four days and four nights and proceeded to trial. A jury was expressly waived for the very purpose of expediting the case. Mr. Sutter undertook the case to prevent a grave injustice by representing an innocent defendant insofar as the murder charges were concerned. After approximately six weeks of trial (instead of the two weeks as previously estimated), the defendant Charmont was acquitted of the two attempted murder counts.

Mr. Sutter's undertaking the defense in such a serious case on short notice, and by working night and day, is in the highest tradition of the state and federal bars and Mr. Sutter's representation of the defendant Charmont exemplifies the type of trial attorney Mr. Sutter is reputed to be and is and has been over the past two decades.

Mr. Sutter's conduct in the Charmont case was not disrespectful nor disruptive to the United States District Court for the Eastern District of New York in the Rastelli trial. Admittedly, Judge Platt was disturbed by the fact that Mr. Rastelli's trial would be delayed for a few days, however, Mr. Rastelli's case did proceed to trial on April 1, 1976, after the court finally allowed substitution of the firm of Saxe, Bacon & Bolan, P.C. on behalf of Mr. Sutter on March 30, 1976 within a period of time shorter than that recommended by the Court of Appeals.

In re Farquhar, 492 F. 2d 561 (D.C. Cir., 1973)) concerned an attorney who was held in contempt for returning late to the trial in which he was already engaged. Farquhar went to inform one Judge Gasch that he would not be able to attend a scheduled bond hearing because he was actively engaged in Judge Hart's courtroom. Judge

Gasch assured Farquhar that the bond matter would be expeditiously handled. Farquhar remained to participate in the bond hearing and consequently was late in returning to Judge Hart's courtroom. Prior to the recess Judge Hart told Farquhar that he might inform Judge Gasch of his actual engagement, but, "If counsel is one second late he will be fined." (492 F. 2d 561 at 563). In reversing the contempt conviction, the appellate court noted that,

> "Criminal contempt requires both a contemptuous act and a wrongful state of mind." (*In re Farquhar, supra,* page 564).

Although Farquhar was not blameless for the creation of this conflict and perhaps might have foreseen the potential for an impasse, his conduct was neither contumacious, nor was it in reckless disregard of the court's order; it did not disclose a reckless disregard for his professional duty; or show that he intended any disrespect for the court.

When Mr. Sutter accepted the state court engagement, he did so because the defendant was instructed he would have to go to trial without counsel if counsel were not prepared to go to trial. Mr. Sutter then worked for four days and nights to prepare the case and worked day and night during the trial and every weekend. He was assured by the prosecutor, Mr. Stephen Irace, and by the court, that the case would take no longer than two weeks. Mr. Sutter added an additional week to their estimate which would have meant that he could have gone to trial on March 29th as scheduled. As soon as Mr. Sutter perceived a possible conflict, he took steps which he judged appropriate to satisfy the demands of both state and federal cases.

Mr. Willson notified the United States Attorney who informed the court ten days prior to the scheduled date of trial that Mr. Sutter was actively engaged in a serious criminal matter at the direction of a New York State

County Court Judge and that the firm of Saxe, Bacon & Bolan, P.C. wanted to substitute for Mr. Sutter and that defendant Rastelli desired this change.

The hearing ordered on May 19, 1976 was not the result of "rumor" but was caused by Mr. Sutter's associate, Willson's notifying the prosecutor Mr. Bronstein (pages 116a-117a). Mr. Bronstein did inform the court before the 19th of the potential problem. During that ten day period, the firm which eventually tried the Rastelli case tried to intervene requesting merely a few days adjournment to prepare. Judge Platt refused the extension, in spite of the fact that a speedy trial had been waived by Mr. Rastelli. Saxe, Bacon & Bolan, P.C. even sought to intervene by way of mandamus to this court which on March 29, 1976 (pages 9a-36a) turned down (142a) the request and advised Judge Platt (55, etc.). Although this court refused to intervene on behalf of defendant Rastelli to change counsel, the court did suggest that Judge Platt reconsider, "the equities, interests and policies underlying his denial of the request for a continuance" (page 144a). Judge Platt stated in his order of March 30, 1976 (145, etc.) that in light of the aforementioned request he would grant the substitution of Mr. Sutter, but that Mr. Sutter would be fined $1,500.00 for the three day delay he allegedly caused.

Judge Platt further commented that had Saxe, Bacon & Bolan, P.C., spent the seven days preparing for Mr. Rastelli's trial, in lieu of making the application for mandamus, the time spent might well have been better spent (implying that the firm to be substituted could be ready for trial on the day fixed for trial).

Unfortunately, the events were not thrust upon the District Court solely by Mr. Sutter's non-attendance on the 29th; the court even refused to compromise after defendant Louis Rastelli had been severed from the joint trial thereby shortening the trial; the government attorney, Mr.

Weintraub, consented to a week's continuance (pages 40a-42a); only after this court suggested a continuance in the interests of justice did the lower court permit the substitution.

Another point of contention which apparently did not disturb the District Court Judge was the fact that Mr. Willson, of Mr. Sutter's office, stated that Mr. Sutter had perhaps not given the Rastelli case the attention it deserved. However, Judge Platt did not believe or consider for one moment that Mr. Sutter was unable to try this case because of any unpreparedness (page 41a). In fact the court commented on March 24, 1976:

> "Mr. Sutter is a well known, and as I understand it, a very competent attorney. I don't for one minute believe that Mr. Sutter is not capable of trying this case." (page 41a).

Furthermore, this statement made by Mr. Willson was incorrect. Mr. Sutter had conducted all of the interviews with Mr. Rastelli immediately after the indictment and prior to the conferences recited by the court. From the record herein it is apparent that Mr. Willson was primarily concerned about Mr. Rastelli's health. Mr. Willson as further explained in the affidavit Mr. Sutter submitted, did not, as Mr. Sutter's trial assistant, prepare the case to his liking as Mr. Willson had been seriously ill and at that time his wife was expecting their first child momentarily. (In fact the baby was born April 7, 1976.)

The point is simply that Mr. Sutter's conduct was not contumacious; it was not intentional, nor was it in any way willfully disobedient to the mandate of the District Court. Mr. Sutter's fully explained conduct, which is borne out in argument in the record below before Judge Platt, arose because Mr. Sutter deliberately and earnestly sought to secure the acquittal of an innocent defendant who was charged with two most heinous crimes. Mr. Sut-

ter's conduct does not justify the United States District Court holding him in contempt (as indeed it did) and the imposition of a $1,500.00 fine.

We respectfully submit that counsel's conduct before Judge Platt was not contemptuous as defined in Title 18, Section 401 or any of the cases decided under applicable statutes. Section 401 is pertinent because Judge Platt on the purported hearing of March 30th (page 90, etc.) recited the section number (page 92a) in response to Mr. Moffatt's request for a hearing in order to demonstrate to the court that Mr. Sutter's conduct was not intentional, willful or in any way deliberate.

It is respectfully submitted that counsel on this brief have been unable to find a statute or rule which defines or creates a priority in the scheduling of trials in the District Court of the United States over an actual trial engagement in the state courts. There certainly was no attempt on Mr. Sutter's behalf to engage himself in a state matter in order to avoid or delay a federal trial. The circumstances demonstrate that more than three weeks time was provided for by counsel in his estimation where the court and prosecutor estimated only two weeks. Defense counsel cannot be responsible for the ineffectiveness or delays caused by a prosecutor in presenting his case by an honest estimate of a trial's duration; for honest miscalculation or for unforeseen circumstances. Mr. Sutter's client was acquitted of the attempted murder charges despite the fact that he was only able to spend a few days in preparation and because he worked every day and night and every weekend during the six week trial in order to properly defend the accused.

The District Court's reliance upon the failure to inform Judge Samenga of the federal engagement was misplaced. It was not deliberately done to deceive Judge Samenga because as explained above the engagement although

urgent was not thought to be a lengthy one. Under such circumstances the certificate of engagement for March 29th was inconsequential on March 8, 1976 because everyone believed the state trial would long have been completed. Also, in view of prior conferences with Judge Samenga prior to March 8, 1976 and in view of the fact that the case had been marked ready by Charmont's prior counsel Judge Samenga informed Mr. Moffatt that the case was marked ready and must be started immediately on that date. Although Judge Samenga is a most gracious and cooperative Judge, it can hardly be urged that he would grant a delay of the Charmont trial scheduled before him because of a federal certificate of engagement which was to commence three weeks in the future. Under these intense pressures the failure to display the certificate was readily understandable.

It is respectfully submitted that upon the foregoing record counsel's conduct was not contemptuous of the court; it was in no way deliberate; it was in no way willfully or intentionally disrespectful of the District Court's mandate. Counsel's conduct did not deserve the severe punishment imposed by the District Court.

POINT II

Fine imposed as costs upon appellant in the amount of $1,500.00 was unwarranted under the circumstances.

The power to punish for contempt must be used sparingly and only when it is clearly demonstrated that the appellant's conduct is contumacious. *Parmelee* v. *Keeshin*, 294 F.2d 310 (7th Cir., 1961).

> Where . . . the purpose of the contempt proceeding is to vindicate the authority and dignity of the court, the punishment imposed should bear some reason-

able relation to the nature and gravity of the contumacious conduct. *United States* v. *Comole*, 365 F. 2d 306 at 308 (3rd Cir., 1966)

In view of the circumstances herein it is most respectfully submitted that the court was surely owed a duty to be informed of the potential delay. We respectfully submit the court realistically knew on March 19 of the potential delay to the scheduled trial of Rastelli. The court chose to ignore the reality and burdened defense counsel by forcing counsel into failing to appear on March 29, 1976. Mr. Sutter at no time intended to shirk his responsibilities. He could not in good conscience at that very time abandon a defendant who faced two life sentences in the state court. The District Court knew on the 19th that Saxe, Bacon & Bolan, P.C. wanted to substitute for Mr. Sutter and that the defendant desired this change, but the court refused to acknowledge that fact thus directing and forcing Saxe, Bacon & Bolan, P.C. to seek the unsuccessful mandamus relief.

It is submitted that the court below punished Mr. Sutter unfairly herein by imposing a $1,500.00 fine.

Upon reflection, the record indicates that perhaps Mr. Sutter should have notified Judge Platt on February 28th when he actually undertook the defense of the state matter. It is inconceivable that on February 28th anyone would believe that the Rastelli trial would have been adjourned for other than reasons of health. The record amply demonstrates that Judge Platt would not consider an adjournment of the Philip Rastelli case for any reason regardless of the consequences to the lawyers involved and no matter what the effect this would have on Mr. Rastelli's health. The court had predetermined that March 29th would be the official trial starting date of trial and nothing would be permitted to intervene (pages 42a, 100a, etc.). This is a thoroughly commendable ideal, but the frailties of man (and lawyers are men) make this ideal not always

attainable and at times justice always requires some degree of flexibility.

The court below was predisposed to punish Mr. Sutter. After the "cursary hearing" on March 30, 1976, at which time Mr. Sutter appeared. The court read its order from what appeared to be twelve pre-written typewritten pages. After the so-called hearing the Judge did not leave the bench, but proceeded to read its order in the form aforesaid. If that is to be considered a fair hearing on the issue of contempt, then it was clearly insufficient as a matter of law. (See *United States* v. *Meyer*, 462 F. 2d 827 (D.C. Cir., 1972)).

We believe the court misapprehended the circumstance throughout in any event because it never found Mr. Sutter to be in contempt. It imposed the fine in retribution for Mr. Sutter's becoming engaged on February 28th and starting a trial on March 8th on the basis that Mr. Sutter knew he had an engagement in the federal court on March 29th. (It is to be noted that Judge Platt, in reading into the record the court's order after the so-called hearing held on March 30, 1976, ordered and "imposes a fine of $500.00 a day for each day . . ." (page 126a); yet, the final written order issued which is the order appealed from reads "Accordingly the court imposes on Mr. Sutter costs of $500.00 a day for each day . . ." (page 152a)). Clearly, the punishment does not fit the conduct engaged in by Mr. Sutter.

If there was an inconvenience the court clearly contributed to it when it impaneled a jury with the knowledge that Mr. Sutter was engaged and in failing to permit substitution by granting a short continuance and in finally reconsidering the substitution only upon the request of this court.

It is respectfully submitted that this court should reverse the proceedings below and order that the fine be re-

imbursed. The record clearly speaks for itself; trial attorneys are under constant pressure and the good and respected ones are in more demand than others. Mr. Sutter does not deserve to lose the respect of this court or the state court involved as a result of the facts and circumstances heretofore detailed which are borne out by the record. Mr. Sutter's conduct was not precipitous or predetermined. If certification of engagement can be issued by the federal courts almost four months in advance of trial which are binding upon the state courts engaged in serious felony trials, then defense attorneys ought to be protected by joint federal and state legislation from sanctions declaring preferences, if any.

CONCLUSION

The order of the District Court imposing a $1,500.00 fine upon defense counsel should be reversed and the fine remitted.

Respectfully,

JAMES R. MOFFATT, Esq.
Attorney for Appellant,
John Joseph Sutter
33 Willis Avenue
Mineola, New York 11501

(516) 747-5800

JAMES R. MOFFATT
GINO PAPA
Of Counsel

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,
Plaintiff-Appellee,

v.

Philip Rastelli, et al.,
Defendants,

John Joseph Sutter, Esq.,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of New York

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Helen D'Esposito, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 28 Ridge Road, Albertson, New York 11507
That on July 8, 1976, she served two copies of the Brief and one copy of the Appendix on

Hon. David Trager
United States Attorney for
the Eastern District of
New York
225 Cadman Plaza East
Brooklyn, New York 11201

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Helen D'Esposito

Sworn to before me this
8th day of July, 1976

Charles J. Esposito

CHARLES J. ESPOSITO
Notary Public, State of New York
No. 30-1132025
Qualified in Nassau County
Commission Expires March 30, 1977